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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6251

WILLIAM B. CALVERT,

Petitioner,

v.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS
AND
WILLARD A. MORRIS, STATE ADMINISTRATOR
OF ELECTION LAWS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

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The petitioner William B. Calvert respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in this proceeding on October 10, 1974.

OPINIONS BELOW

The opinions rendered in this proceeding by the Court of Appeals of Maryland and by the Circuit Court for Cecil County, Maryland appear in the appendix hereto. Neither opinion has yet been reported.

JURISDICTION

On August 23, 1974, the Court of Appeals of Maryland entered a per curiam order reversing, without explanation, the judgment of the Circuit Court for Cecil County. The Court of Appeals did not enter an opinion setting forth the grounds for that per curiam order until October 10, 1974, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a state may lawfully prohibit the election of more than one resident of a county to the lower house of the state legislature when that county contains more than sixty per cent (60%) of the population of a three-county legislative district which elects three members to the lower house of the state legislature on an "at large" basis.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

JUDICIAL ORDER INVOLVED

In Re Legislative Districting of the State, 271 Md. 320, 324, 317 A.2d 477, 479 (1974):

[General Provisions]

"(D) In any legislative district which contains more than two counties or parts of more than two counties, and where Delegates are to be elected at large by the voters of the entire district, no county, or part of a county, shall have more than one Delegate residing in it."

Id. at 331, 317 A.2d at 483:

[Composition of Legislative Districts]

"(HH) Legislative District 34 shall consist of the following areas: All of Cecil County, Kent County, and Queen Anne's County. Legislative District 34 shall elect three Delegates at large."

STATEMENT OF THE CASE

Under the terms of the Maryland Constitution, the legislative powers of the State are vested in a bicameral legislature called the General Assembly of Maryland. Md. Const. art. III, §1. The upper house, or Senate, has forty-seven (47) members; the lower house, or House of Delegates, has a membership of one hundred forty-one (141). Md. Const. art. III, §2. The Constitution provides that the State shall be divided into forty-seven (47) legislative districts, with one (1) Senator and three (3) Delegates elected from each district. Md. Const. art. III, §3.

The Maryland legislative districting plan now in effect was promulgated by the Court of Appeals of Maryland on March 22, 1974. *In Re Legislative Districting of the State*, 271 Md. 320, 317 A.2d 477 (1974).[1] Paragraph (D) of the plan's "General Provisions", quoted above, provides that, regardless of population, in those legislative districts which are comprised of more than two counties, just one resident of each county may be elected to the House of Delegates in an "at large" election. Only three of the districts created by the Court's order — Legislative Districts 34, 35, and 36, all of which are located on Maryland's "Eastern Shore" — fall within the operation of this provision. Appendix, p.18a. The question raised in this proceeding is whether the county residency restriction contained in paragraph (D) of the Court's districting plan may constitutionally be applied to Legislative District 34.

Legislative District 34 is comprised of three counties — Cecil, Queen Anne's, and Kent — which vary widely in population. The trial court found that, according to 1970 census data, "Cecil County has 53,291 people or 61% of the population [of the District]; Queen Anne's has 18,422 people or 21% of the population; and, Kent has 16,146 or 18% of the population. The approximate ratio is 3.3 to 1.1 to 1.0 respectively." Appendix, p. 5a. In spite of this enormous disparity between the population of Cecil County and the populations of the other counties in Legislative District 34, the Attorney General of

[1] The Court had previously invalidated a districting plan promulgated by the Governor of Maryland because of the Governor's failure to hold public hearings on the plan as required by the Constitution. Md. Const. art. III, §5. Thereafter, the Court appointed a special master to hold the required hearings and ultimately adopted a districting plan almost identical to that which had been proposed by the Governor. Appendix, pp. 17a-18a.

Maryland advised State election officials on July 19, 1974 that under the districting plan adopted by the Court of Appeals only one resident of Cecil County could be nominated for election to the House of Delegates from that District. Appendix, p. 2a.

Petitioner is a resident of Cecil County, Maryland and was a candidate for the Democratic nomination for election to the House of Delegates from Legislative District 34 in the primary election held on September 10, 1974. On August 9, 1974, petitioner brought action in the Circuit Court for Cecil County against the appropriate County and State election officials seeking declaratory and injunctive relief on the grounds that respondents' proposed application of the county residency restriction to the primary election in Legislative District 34 violated the rights of petitioner and all other residents of Cecil County under the Equal Protection Clause of the Fourteenth Amendment.[2] A hearing was held on August 14, 1974, and the Chancellor issued his opinion two days later. Appendix, pp. 1a-13a. The Chancellor found that the proposed plan for the nomination and election of members to the House of Delegates from Legislative District 34 contained an "invidiously wide disparity in population" which did "not approximate the concept of one man-one vote." Appendix, p. 5a. Accordingly, he issued an order enjoining the respondent election officials from enforcing the county residency restriction in the primary election for nomination of candidates for the House of Delegates from Legislative District 34. Appendix, p. 12a.

[2] Respondent also sought relief on the grounds that the ballot which the respondents proposed to utilize in the primary election failed to comply with a Maryland statutory requirement that all candidates be listed on the ballot. The Circuit Court found this contention meritorious. Appendix, p. 4a.

The respondent State election officials noted an appeal from the Circuit Court's order to the Court of Special Appeals of Maryland on August 19, 1974.[3] The parties then jointly petitioned the Court of Appeals of Maryland for a writ of certiorari. The Court of Appeals granted the writ, heard argument, and on August 23, 1974 entered a per curiam order reversing the decision of the Circuit Court. Appendix, p. 13a. On October 10, 1974, the Court of Appeals issued an opinion setting forth the grounds for its reversal. The Court ruled that under the terms of the Maryland Constitution (Md. Const. art. III, §5) it had exclusive original jurisdiction to pass on the merits of petitioner's Constitutional claim, and ruled that that claim was without merit under recent decisions of this Court.[4] Appendix, pp. 21a-28a; 32a-38a.

In accordance with the per curiam order entered by the Court of Appeals on August 23, 1974, the county residency restriction was applied in the September 10, 1974 primary election in Legislative District 34. Although petitioner received the third highest total of votes among all candidates in the District, he was not declared a Democratic Party nominee for election as one of the three representatives from the District in the Maryland House of Delegates. Two of the nominees — a resident of Cecil County and a resident of Queen Anne's County — received more votes in the primary election

[3] The County election officials who were named as respondents in the Circuit Court did not appeal from that Court's order and took no part in the proceedings on appeal. Thus, those officials have not been named as respondents in this Petition.

[4] The Court also rejected petitioner's claims that the residency restriction violated the Maryland Constitution and that the primary election ballot did not conform with the requirements of Maryland statutory law. Appendix, pp. 28a-32a.

than the petitioner. Because only one resident of Kent County filed for the nomination, his name was omitted from the ballot and he was declared nominated even though he received no votes in the primary election.

REASON FOR GRANTING THE WRIT

IN ITS DECISION BELOW, THE MARYLAND COURT OF APPEALS DECIDED A FEDERAL QUESTION OF SUBSTANCE, INVOLVING THE RIGHTS OF CITIZENS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

In its opinion below, the Court of Appeals of Maryland held that a state may constitutionally require that citizens of a legislative district comprising three counties elect, as two of their three representatives in the lower house of the state legislature, residents of two counties which together have less than half of the population of the whole district. In doing so, the Court relied extensively upon the decision of this Court in *Dusch v. Davis*, 387 U.S. 112 (1967), and explicitly overruled a prior decision in which it had held an indistinguishably similar residency restriction invalid under the Equal Protection Clause of the Fourteenth Amendment. *Secretary of State v. Bryson*, 244 Md. 418, 224 A.2d 277 (1966). Petitioner submits that the principles announced in the *Dusch* case cannot logically or lawfully be extended to uphold the residency restriction applied in Legislative District 34.

The decision in *Dusch* involved a plan of municipal government adopted by the city of Virginia Beach after it had consolidated with Princess Anne County. The borough form of government adopted by the city included a city council composed of eleven members, four of whom were elected at large without regard to residence

and the remaining seven members of which were also elected by the voters of the whole city, but with a requirement that one member reside in each of the seven boroughs. This became known as the "Seven-Four Plan". Three of the boroughs were primarily urban in character, and had populations of 13,900, 23,731, and 29,048. Three boroughs — having populations of 733, 2,504, and 7,211 — were primarily rural; one borough — with a population of 8,091 — was primarily tourist. Speaking through Justice Douglas, this Court found that the "Seven-Four Plan" reflected a reasonable "detente between urban and rural communities" and thus met the minimum requirements of the Equal Protection Clause. 387 U.S. at 117.

The holding of this Court in *Dusch* must be distinguished from the case at bar in at least two critical respects. First, as Justice Douglas noted in his opinion, the Virginia Beach plan did "not preserve any controlling influence of the smaller boroughs". 387 U.S. at 116. The urban boroughs which contained a *majority* of the city's population could easily elect a resident *majority* on the eleven-man council when considering the number of at large candidates whom their voting strength would enable them to elect. In contrast, the plan here at issue provides that a *majority* (two) of the Delegates from Legislative District 34 *must* be residents of counties containing a distinct *minority* of the District's total population. This is a patent violation of the one man-one vote principle which cannot be justified under *Dusch*. See, for instance, *Mandicino v. Kelly*, 158 N.W.2d 754 (Iowa 1968) in which the Supreme Court of Iowa struck down a districting plan for the election of county supervisors which forbade the election of more than two residents of Sioux City township to the five-member board of supervisors under a purportedly "at

large" voting arrangement where Sioux City had a population of 89,159 and the other townships had a total population of only 18,690.

The second important distinction between *Dusch* and the case at hand arises from the nature of the geographical units involved. It can scarcely be denied that the residency requirements upheld by the Court in *Dusch* were to some extent discriminatory in that the "voters in the smaller districts probably have more influence than they would have without the requirements". "The Supreme Court, 1966 Term," 81 Harv. L. Rev. 155 (1967). Nevertheless, the Court found that such discrimination was not invidious in that it was designed to afford for rural elements within a city some representation on the governing body of that city. A prominent authority in this field has noted that the theme of *Dusch v. Davis*

> "seems to have been the desirability of leaving room for experimentation in representation forms at the local level. . . [T]he Court seems to have placed the Virginia Beach consolidation case in the context of the urban-metropolitan governmental muddle. The unresponsiveness of present local government forms to urban-suburban social and political problems, and the need for creativity in devising better arrangements, are themes of our times." Dixon, "Local Representation: Constitutional Mandates and Apportionment Opinions", 36 Geo. Wash. L. Rev. 693, 700 (1968).

Unlike the new city of Virginia Beach, Legislative District 34 is not a local political unit with its own governing body. Legislative District 34 is a political unit artificially created for the sole purpose of defining an area from which one Senator and three Delegates should be elected to the Maryland General Assembly.

The Court in *Dusch* found that it was reasonable to implement a plan whereby the urban residents of Virginia Beach sacrificed *some* representation on the city council in order to gain an "intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population". 387 U.S. at 116-17. There is and can be no similar justification for a plan which does nothing more than require the voters of Cecil County to sacrifice much of their representation in the House of Delegates simply to benefit the voters of two other less populous counties. Thus, the Circuit Court properly concluded that "[t]he District 34 plan operates to minimize the voting strength of the voting population of Cecil County without the reason or justification found in *Dusch*". Appendix, p. 9a.[5]

The Court of Appeals in its opinion cited the "peculiar geography of the Eastern Shore of Maryland, cut as it is by navigable streams" as a justification for the discriminatory residency requirement applied to Delegates elected from that area. Appendix, p.20a. This Court has held that a legislative apportionment scheme involving districts of substantially unequal populations cannot be sustained as "an attempt to balance urban and rural power in the legislature", *Davis v. Mann*, 377 U.S. 678, 692 (1964), or "to protect 'insular minorities' and to ac-

[5] The Court of Appeals also attempted to justify its extension of the holding in *Dusch* to Legislative District 34 by declaring that the instant case presented "an analogous situation to that ruled upon and upheld" by this Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965). As the Court pointed out in *Dusch*, however, "[i]n Fortson there was substantial equality of population in the senatorial districts" which were subject to the residency requirement. 187 U.S. 115-16. It can scarcely be contended that there is "substantial equality" between the population of Cecil County and the populations of Kent and Queen Anne's Counties.

cord recognition to 'the state's heterogeneous characteristics' ", *Lucas v. Colorado General Assembly*, 377 U.S. 713, 738 n.31 (1964). As Chief Justice Warren stated in *Reynolds v. Sims*, 377 U.S. 533, 580 (1964):

> "Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's most claims, that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing."

Thus, this Court has repeatedly discountenanced the notion that geographical considerations can justify a districting plan which accords residents of one area of a state substantially less representation in the state legislature than residents of another area.

The Court in its decision below also noted that two of the three counties of Legislative District 34 must rely on "local legislation" passed by the General Assembly for the government of their local affairs. Appendix, p. 27a. As the Court itself stated, however, one of those three counties has adopted a system of "home rule", and there is nothing to prevent the other two counties from adopting either of two optional systems of "home rule" afforded by the Maryland Constitution. Md. Const. arts. XI-A, XI-F. Moreover, it must be noted that, just twelve years ago, the Court of Appeals chose to emphasize the independence of Maryland's counties, rather than their reliance on the legislature, in upholding a system under

which representation in the State Senate was allocated by county rather than population. At that time the Court said that the counties were analogous to the states of the Union in that they "have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and administration of justice, with a minimum of supervision by the State." *Maryland Committee for Fair Representation v. Tawes*, 229 Md. 406, 412, 184 A.2d 715, 718 (1962), *rev'd* 377 U.S. 656 (1964).

The Court of Appeals in its opinion relied heavily on the recent decision of this Court in *Mahan v. Howell*, 410 U.S. 315 (1973) in concluding that there were "rational bases" for the imposition of a county residency limitation of Delegates elected to represent the people of Legislative District 34. Appendix, pp. 25a-28a. A majority of this Court in *Mahan* held that "[t]he policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature . . . is a rational one" which would justify some deviation from strict arithmetical equality among the populations of legislative districts. 410 U.S. at 329. Nevertheless, the Court was careful to point out that "a State's policy urged in justification of disparity in district population, however rational cannot constitutionally be permitted to emasculate the goal of substantial equality." 410 U.S. at 326. Petitioner submits that an apportionment plan which requires that two-thirds of a legislative district's representatives be residents of counties containing less than one-half of the district's population clearly subverts the very concept of substantial equality.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER GRANTING THE RELIEF PRAYED

In The Circuit Court For Cecil County

Equity No. 3940-B

William B. Calvert

v.

Janet D. McKinney, et al., constituting Board of Supervisors of Elections for Cecil County, et al.

I. Petitioner Has Filed in Time

The Respondent charges laches in that the districting plan was known eighteen (18) months ago. The Court of Appeals Order including a provision that no County in District 34, *inter alia*, is to have more than one Delegate residing in it was filed March 22, 1974. The Petitioner apparently did not file as a candidate for the House of Delegates until late June 1974. The State election authorities who prepared the draft ballot found it necessary to seek the guidance of the Attorney General. His Opinion was not rendered until July 19, 1974. The draft ballot was not published until July 27, 1974. The Petitioner protested the ballot to the State election authorities August 2, 1974. Relief was denied August 5, 1974 and he was advised August 6, 1974. He filed his Petition in this Court August 9, 1974. A view of the total circumstances does not, in the opinion of this Court, substantiate a finding of laches.

The Respondent also makes an effort to bar the Petitioner on statutory grounds that he has not filed in time but this effort seems feeble because Respondent admitted at argument that the Petitioner had been reasonably prompt and could well be held to have complied with the statute. The Court holds that he has done so.

II. All Names Are To Be on the Delegate Ballot

The Court of Appeals Order *In the Matter of Legislative Districting of the State*, 271 Md. 320 (1974) provides that Legislative District 34 shall be Cecil, Kent and Queen Anne's Counties, from it shall come three (3) Delegates, and no county may have more than one Delegate living in it. Only one Democratic candidate has filed who lives in Kent County. The Attorney General in an Opinion rendered July 19, 1974 believes the name of this candidate may be omitted from the primary ballot and that instead of being allowed to vote for three (3) the Democratic voters of District 34 may only vote for two (2). The Court of Appeals has not decided this point.

A resident of Cecil County who is running in the Democratic primary for a Delegate seat has petitioned this Court to require the name of the Kent County resident to appear on the primary ballot.

The first question is whether or not the Petition should be granted. The Court thinks it should.

When only one candidate qualifies to have his name on the ballot his name and the name of his position shall be omitted. The ballot is to contain "only the names of such candidates for * * * delegates * * * where there are qualified contestants for such positions." Article 33, Sec. 5-3(c). This statute applies with no problem in *every* case except the case at bar. Both the Petitioner and the Respondent agree the present case is unique and one of first impression. If no other Democrat is running, as is true except here, the name of the sole candidate need not appear on the

primary ballot. But seven (7) Democrats are running here. True, only one lives in Kent County and the Court of Appeals Order aforesaid provides no county shall have more than one Delegate residing in it. But, it does not provide that in these circumstances his name shall be omitted from the primary ballot. Nor should it because he is to be elected at large. He is not a candidate of one county. He is a candidate of three counties. The office involves that of a Delegate from a legislative district rather than a Delegate living in one county. He is to represent the entire District 34 and all the people living in it. He should be presented to all the voters in District 34.

We therefore fully concur with the Opinion of the Attorney General set out on page 8 thereof:

> "Clearly each registered voter affiliated with a party may vote for candidates at the primary election who reside in other counties within the district. This is the very essence of at-large voting. Furthermore, we do not believe that the restriction on the number of candidates residing in a given county who may be elected (or nominated at a primary election) can or should serve as the basis for a restriction on the candidates a given voter will or may vote for. It is our opinion that, despite the fact that no more than one candidate can be elected (or nominated at a primary election) from a particular county, each individual voter should be free to vote for more than one person residing in that county and should be subject only to the limitation that he may vote for no more than three candidates throughout the district. Each of the three successful candidates will be the representative of the individual voter and we can find no authority in either the Maryland Constitution, Article 33 or the Court of Appeals' order which would justify preventing a voter from voting for the candidates of his choice, regardless of his or their county residence. The limitation on the number of persons who may be elected (or nominated) from a given county applies to the results of the election

and not to the choices available to the voter. In the absence of some specific authority for restricting the choice of the individual voter, we think that he should be left free to vote for whichever three candidates he thinks best qualified, regardless of their county of residence and even if all three candidates could not lawfully be nominated or elected. Restrictions on the ability of the voters to vote for the candidates of their choice should not lightly be implied."

For the very reasons given in the Opinion of the Attorney General it does not seem to us that the conclusion should follow that to place the name of the Kent County resident on the primary ballot would be either "an exercise in futility" or cause "voters to cast their votes for him unnecessarily." There are six (6) other qualified contestants for the positions of Delegates running at large in Legislative District 34. We conclude that the statute, Article 33, Section 5-3(c), was not and should not have been intended by the Legislature to apply to the unique situation here presented.

One other pragmatic reason the Kent County name should appear on the ballot concerns the possible voter mix. Given any number of voters voting for two (2) of seven (7) candidates (with one omitted) the electoral result will almost certainly be different than if voting for three (3) of seven (7) candidates (with none omitted). This Court cannot lend validity to such an unnecessary distortion which poses the possibility of Candidate A winning instead of Candidate B because the name of Candidate C was omitted from the ballot.

A further question is whether or not this Court can require the candidate's name to appear on the ballot. Clearly there is neither constitutional nor statutory nor case made law barring the imposition of the requirement.

III. The Court Will Enjoin

The Petitioner also seeks to enjoin the issuance of "Special Instructions of the Attorney General to the voters in Legislative District 34" filed as Respondent's Exhibit 1 stating that no county may have more than one member of the House of Delegates residing in it. This Court will enjoin because it is unconstitutional under the principle of *Reynolds v. Sims*, 377 U.S. 533 and *Secretary v. Bryson*, 244 Md. 418. It is readily distinguishable from *Dusch v. Davis*, 387 U.S. 112 (1967) and the decision is not inconsistent with the Exparte Order passed *In The Matter of Legislative Districting of the State, supra.*

A. *One Shall Have Just One Vote*

One man should have just one vote. Cecil County has 53,291 people or 61% of the population; Queen Anne's has 18,422 people or 21% of the population; and Kent has 16,146 or 18% of the population. The approximate ratio is 3.3 to 1.1 to 1.0 respectively. The gains over the past decade have been 4,883 in Cecil, 1853 in Queen Anne's and 665 in Kent, *Hughes v. Maryland Committee*, 241 Md. 471, 488. The relative trend of population increase is clear and the disparity is presumably continuing to widen. Despite this invidiously wide disparity in population under the plan sought to be enjoined each County may elect one delegate. The Kent County voter has 3.3 votes to the Cecil County voter's one (1) vote. This clearly does not approximate the concept of one man-one vote.

Reynolds v. Sims, 377 U.S. 533 decided by the United States Supreme Court in 1964 established that one man should have just one vote. Although recognizing the impracticability of apportioning on the basis of an exact mathematical formula it mandated that we do so as nearly as possible. Pertinent excerpts which follow from the Opinion indicate the rationale as applicable here.

> "Diluting the weight of votes because of place of residence impairs basic constitutional rights under

the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, * * *."

"And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical."

"But the basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

"We are told that the matter of apportioning representation in a state legislature is a complex and many faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets

> and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."

The statute giving rise to the "Special Instructions of the Attorney General" which this Court holds unconstitutional is Article 40, Section 46(d) which has been copied into the Order *In re: Legislative Districting of the State, supra,* as General Provision (D) and reads:

> "In any Legislative District which contains more than two counties or parts of more than two counties, and where delegates are to be elected at large by the voters of the entire district, no county, or part of a county, shall have more than one delegate residing in it."

In addition to the *Sims* case the applicable law here was clearly decided and set forth by the Court of Appeals of Maryland in *Secretary of State v. Bryson,* 244 Md. 418 (1966). The Court there held unconstitutional a statute virtually identical with the statutory provision involved here. So far as is known the holding and rationale of *Bryson* have never been disturbed.

B. *Dusch v. Davis Distinguished*

In the mid sixties the City of Virginia Beach consisted of seven (7) boroughs, one (1) a seashore resort, three (3) urban and three (3) rural. The municipal council was composed of eleven (11) members, four (4) elected at large and one (1) from each of the seven (7) boroughs. The differences in borough population ranged from 733 to 29,000 per borough. On the theory that one man had just one vote this plan was attacked, upheld by the nisi prius court, struck down by the 4th Circuit Court of Appeals which appellate court was in turn reversed by Justice Douglas in the United States Supreme Court in the case of *Dusch v. Davis,* 387 U.S. 112 (1967). That case can be readily distinguished from the case before us now.

The provision for four (4) floating delegates who could reside anywhere in the City of Virginia Beach was a substantial effort to comply with the principle of *Reynolds v. Sims* and the Equal Protection clause of the 14th Amendment. Such effort is missing in the plan for District 34. The District 34 plan is an invidious discrimination because of the wide disparity in population. It is unpopular and calculated to excite resentment or give offense. It is fallacious to say that when interests differ each delegate will not represent the voters of his county over the voters of the other counties.

It is true that where a community of interest exists the three (3) delegates will represent all the people in the entire district and can be expected to vote together. Given a like community of interest any geographic combination of delegates would do the same. With this we are not concerned.

Rather, we must concern ourselves with the occasion of differences of interest when it is, by all the laws of human behavior and self interest and common sense, quite incorrect to view these three (3) delegates as representing all the people. To believe differently is illogical. At such a moment the constitutional principle of equal protection is violated. Nor do we have here the ameliorating effect the four (4) floating delegates afforded the boroughs of Virginia Beach.

The *Dusch* case was decided because of a heterogeneity. One (1) borough was a seashore resort. Three (3) boroughs were decidedly urban. The other three (3) boroughs were at the other extreme, decidedly rural. "Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city," stated Justice Douglas speaking for the Court (quoting with approval the District Court Opinion). The Court further held that this "demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems."

District 34 poses no such problems. The three (3) counties are, for the most part, a homogenous group ex-

periencing together the effects of approaching urbanity. Thus, the reason for the *Dusch* holding does not exist.

In fact, *Dusch* stands for the proposition of its own inapplicability to District 34. The Virginia Beach plan the Court stated was a plan "at least during an appreciable transition period" and in closing states further,

> "As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system passes constitutional muster."

The District 34 plan operates to minimize the voting strength of the voting population of Cecil County without the reason or justification found in *Dusch*. This Court now must decide therefore that it does not pass constitutional muster.

Perhaps most important of all, one cannot place too much emphasis on the corollary of the one-man one-vote principle that the burden is on those who propose or defend plans which permit unequal representation to demonstrate that such inequality is affirmatively based upon sound public policies and, for that reason, not invidiously discriminatory. It is not up to those who question the validity of such a plan to demonstrate or prove its shortcomings; the mere fact that such a plan sets up a system of unequal representation establishes a *prima facie* case for the complainant, leaving it to the public authorities to come forward with some positive proof or equivalent demonstration that the plan, although discriminatory on its face, is not "invidiously" so *because* it serves one or more cognizable public benefits.

This is the center of *Dusch*. As Justice Douglas said:

> "The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for in-

telligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population . . .

"The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."

The very opposite must be said about this plan for District 34. The practical result is to preserve in office two incumbent, small county delegates — both fine people and excellent legislators, to be sure, but that is an *ad hominem* judgment for which constitutional principles make no allowance. It *does* preserve, in the district at least, controlling influence in the smaller counties. It *does not* represent any "detente" for the resolution of complex problems in municipal government.

Dusch having been distinguished, this Court relies on Judge Oppenheimer's Opinion, *Secretary of State v. Bryson*, 244 Md. 418 and based upon the reasons therein, particularly at pp. 426 to 428, declares Art. 40, Sec. 46(d) null and void.

C. *The Question Has Not Been Decided*

The Respondents argue that the Court of Appeals has decided this point and reached an opposite result. We do not think so. The Court of Appeals was acting in a special capacity, an ex parte capacity, under a special provision of the Constitution of Maryland giving it original jurisdiction. The persons before the Court were not adversaries. They were *amici curiae*. An *amicus curiae* has been defined as a friend of the Court, a bystander who interposes, volunteers information upon some matter of law in regard to which the court is doubtful or mistaken. It implies friendly intervention of counsel to remind the court of legal matter which has escaped its notice and regarding which it appears to be in danger of going wrong. It has also been defined as a person who has no right to appear in a suit but is allowed to introduce argument, authority or evidence to

protect his interest. *Black's Law Dictionary* (4th Ed.), 107.

The Court of Appeals has not therefore been confronted in any adversary sense with the question raised here. Our situation is not unlike the case of the residency requirement struck down by the Anne Arundel County Circuit Court and by the Court of Appeals in *Bryson*. It was part of a general reapportionment scheme which earlier had been upheld by the Court of Appeals in *Hughes v. Maryland Committee,* 241 Md. 471. Cert. denied, 384 U.S. 950 (1966). The Court in *Bryson* stated that in holding that earlier plan constitutional . . .

> ". . . we considered only its general underlying scheme of apportionment, and found that it constituted an honest and effective State effort to apportion both the Senate and the House of Representatives (sic) on a proportionate basis. The validity of no particular section of the Act was before us, and we did not pass upon the constitutionality of the Section here involved, directly or by inference." 244 Md. 425.

Similarly, nothing in the March 15, 1974 Order of the Court of Appeals (271 Md. 320-334) suggests that the constitutionality of the residency requirement at issue here has been specifically considered by the Court in light of the *Bryson* decision or in light of the matter in which Respondents now seek to apply that requirement in Legislative District 34. In adopting its legislative districting plan, the Court was performing a quasi-legislative function delegated to it by Section 5 of Article III of the Maryland Constitution. It is evident that the Court of Appeals has not yet addressed itself to a full consideration of the constitutionality of Section 46(d) of Article 40 presented in a truly adversarial setting.

Viewed too from a practical point the Court had the primary task of creating forty-seven (47) legislative districts covering the whole State and about which there was much contention. Even if there had been a truly

adversarial setting it may have been inexpedient and premature for the court to have examined into and rendered a prejudgment upon the potential disparities that conceivably could arise within each of the forty-seven (47) districts. The exigencies of time may have hampered such questions from being decided. Such a question in its full adversarial posture arises here for the first time.

There is no law of which this Court is aware specifically requiring that each County have a Delegate. Art. 40, Sec. 46(c) provides that each Legislative District may be subdivided into three (3) whole delegate sub-districts or one (1) whole delegate sub-district and one (1) multi-member sub-district. Conformation to the principle of Equal Protection and the doctrine of *Reynolds v. Sims* will be much more nearly approached with Cecil County as one multi-member sub-district electing two delegates to represent 61% of the people and Kent and Queen Anne's Counties as one whole delegate sub-district electing one delegate to represent 39% of the people. Indeed, this comes very close to the goal which can never be exactly attained wherein one man has just one vote.

The Court will pass an Order consistent with this Opinion.

Order

Consistent with the foregoing Opinion, it is this 16th day of August, 1974 by the CIRCUIT COURT FOR CECIL COUNTY, IN EQUITY

ORDERED that the Respondents prepare ballots which list all the candidates who seek nomination for election to the Maryland House of Delegates from Legislative District 34 and which allow the voters to vote for three (3) candidates for said nomination; and, it is

FURTHER ORDERED that the Respondents, their agents, employees and members are enjoined from taking any action toward ordering, directing, authorizing, or permitting the preparation or printing of any

primary election ballots or "Special Instructions" which will advise or instruct the voters of Legislative District 34 that only one (1) resident of Cecil County may be nominated for election to the Maryland House of Delegates.

H. KENNETH MACKEY,
Judge.

PER CURIAM ORDER
(Filed August 23, 1974)
In The
Court of Appeals of Maryland

No. 133 (Adv.)

September Term, 1974

State Administrative Board of Election Laws et al.

v.

William B. Calvert

For the reasons to be given in an opinion hereinafter to be filed, it is, this 23rd day of August, 1974.

ORDERED, by the Court of Appeals of Maryland, that the Order of this Court adopted March 15, 1974, and filed March 22, 1974, in the case of *In The Matter of Legislative Districting of the State*, 271 Md. 320, setting forth the legislative boundaries of District 34, and declaring that no county within such District shall have more than one delegate residing therein is hereby reaffirmed as being constitutional and valid; and it is further

ORDERED, that the form of the proposed primary election ballot as published and posted by the Board of Supervisors of Elections for Cecil County on July 30, 1974, together with the accompanying instructions issued by the Attorney General, insofar as they pertain to the election of members of the House of Delegates from District 34, are in full compliance with all governing provisions of law; and it is further

ORDERED, that the order of the Circuit Court for Cecil County dated August 16, 1974 be, and it is hereby, reversed and the petition filed in these proceedings is hereby dismissed; and it is further

ORDERED, that the mandate of this Court shall issue forthwith, costs to be paid by the appellee.

ROBERT C. MURPHY
Chief Judge.

OPINION

In The
Court of Appeals of Maryland

No. 133 (Adv.)

September Term, 1974

State Administrative Board of Election Laws, et al.

v.

William B. Calvert

SMITH, J.:

We shall here give our reasons for reversing the decree of a trial court by our per curiam order of August 23, 1974. In so doing, we must present the answers to four questions: (1) the validity of our provision that in a legislative district of more than two counties no county shall have more than one delegate residing in it, a provision applicable by its terms to Legislative District 34, a district of three counties; (2) whether this provision runs counter to the provisions of Maryland Constitution Art. III, § 9 relative to residence; (3) whether the name of an individual who is the sole candidate from his county for nomination by his party to the House of Delegates in a three-county district must be printed upon the primary election ballot of that party; and (4) whether because of the grant by Constitution Art. III, § 5 to this Court of original jurisdiction to review the legislative districting of the State the trial court had jurisdiction to entertain an attack upon the constitutionality of the legislative districting plan.

I.

History of the Litigation

Appellee, William B. Calvert (Calvert), a candidate for the Democratic nomination for the House of Delegates residing in Cecil County, filed a petition in the Circuit Court for Cecil County on August 9, 1974, in which he challenged that portion of the order of this Court in *In re Legislative Districting*, 271 Md. 320, 317 A.2d 477 (1974), which provided:

> "(D) In any legislative district which contains more than two counties or parts of more than two counties, and where Delegates are to be elected at large by the voters of the entire district, no county, or part of a county, shall have more than one Delegate residing in it."

He likewise challenged an application of that order under an opinion of the Attorney General of Maryland issued on July 19, 1974, in which it was concluded that the names of candidates who, by reason of their residence, were unopposed and thus assured of nomination should not be included on the primary election ballot.

Named as respondents were the individuals constituting the Board of Supervisors of Elections for Cecil County, the individuals constituting the State Administrative Board of Election Laws, and the State Administrator of Election Laws. Calvert prayed a permanent injunction:

> "(a) forbidding Respondents from taking any action toward ordering, directing, authorizing, or permitting the preparation or printing of any primary election ballots or 'Special Instructions' which [would] advise or instruct the voters of Legislative District 34 that only one resident of Cecil County [might] be nominated for election to the Maryland House of Delegates," and
>
> "(b) directing Respondents to prepare ballots which [would] list all the candidates who [sought]

nomination for election to the Maryland House of Delegates from Legislative District 34, and which [would] allow the voters to vote for three (3) candidates for said nomination . . . ."

The matter came on for hearing in that court on August 14. The chancellor (Mackey, J.) filed his opinion on August 16. He ordered that ballots be prepared "which list[ed] all the candidates who [sought] nomination for election to the Maryland House of Delegates from Legislative District 34 and which [would] allow the voters to vote for three (3) candidates for said nomination . . . ." He enjoined the respondents "from taking any action toward ordering, directing, authorizing, or permitting the preparation or printing of any primary election ballots or 'Special Instructions' which [would] advise or instruct the voters of Legislative District 34 that only one (1) resident of Cecil County [might] be nominated for election to the Maryland House of Delegates."

The State Administrative Board of Election Laws and the State Administrator of Election Laws noted an appeal to the Court of Special Appeals on August 19. The parties jointly petitioned us for the writ of certiorari. We granted the writ and set the matter for argument on August 23.

Pursuant to Constitution art. III, § 5, the Governor of Maryland submitted to the General Assembly his proposals for legislative redistricting. When the General Assembly failed to adopt its own plan for legislative redistricting, the Governor's plan became law on February 24, 1973.

We were thrust into the center of the matter of redistricting by the combination of the adoption by the people of Maryland of an amendment to Constitution art. III, § 5 providing that this Court should "have original jurisdiction to review the legislative districting of the State" and the failure of the Governor to hold the public hearings required by the same section of the constitution prior to the submission of his redistricting

plan to the General Assembly. Upon challenge to the plan on that basis, we concluded that the Governor's plan was not validly promulgated. We passed an order to that effect on July 31, 1973.

In the matter of granting "appropriate relief" we were faced with the necessity for finding a point of beginning. Our order specified "that said invalidly promulgated plan [was] . . . adopted by the Court as the plan setting forth the proposed boundaries of the legislative districts for the election of members of the Senate and House of Delegates, unless cause to the contrary [were] shown, as [t]hereinafter provided." We ordered "that public hearings be properly scheduled and held in Annapolis, Maryland before the Honorable Hall Hammond, [former Chief Judge of this Court,] a Special Master" appointed by the same order. We provided for notice throughout the State by publication in newspapers in each county. We ordered "that any registered voter of this State, other than the petitioners in the [then pending] proceedings, who desire[d] to show cause why the said plan, or any part thereof, should not be duly adopted as the final legislative districting plan for this State [should] formally intervene in th[o]se proceedings on or before September 30, 1973 . . ." Rather than go off on a project of our own, redesigning and redefining the legislative districts of this State, we elected to exercise judicial restraint by changing only those legislative districts which, upon challenge, we found to be constitutionally invalid.

In the plan proposed by the Governor and in the plan promulgated by us, Legislative District 34 consists of the counties of Cecil, Kent, and Queen Anne's. The provision that no county should have more than one delegate residing in it is identical in both plans. It affects only Legislative Districts 34, 35, and 36, made up of the nine counties comprising the Eastern Shore of Maryland, since only those legislative districts contain "more than two counties or parts of more than two counties."

No challenge was made before or after our order of July 31, 1973, to Legislative District 34. Challenge was made to Districts 35 and 36 based upon the division of Wicomico County and the fact that a part of Somerset County was placed in Legislative District 34 with no means of being reached from other portions of that district by road (other than by use of the ferry at Whitehaven), it being separated from the remainder of the proposed district by unbridged navigable waters. No challenge was made before or after the July 31, 1973, order to the provision relative to residence of delegates until mention was made of the case of *Secretary of State v. Bryson*, 244 Md. 418, 224 A.2d 277 (1966), which we shall later discuss, in a motion for reargument filed by residents of the western part of Wicomico County who objected to being separated from the remainder of that county by being placed in Legislative District 35.

II.

Area Involved

The area under discussion can be best understood by reference to a copy of a portion of the Maryland 1974 official highway map appended to this opinion which the reporter is directed to reproduce.

Cecil County, the northernmost of the three counties, had a 1970 population as shown by the census of that year of 53,291, mostly concentrated north of the Chesapeake and Delaware Canal since that census reflects a total of but 6,010 people residing in its two southernmost election districts, Chesapeake City and Cecilton. It is divided from Kent County by the Sassafras River and its tributaries from the Chesapeake Bay to the Delaware State line. There are but three roads between the two counties. The main road is that which crosses the Sassafras by a drawbridge between Georgetown and Fredericktown. U. S. Route 301, of recent construction, is a limited-access highway which crosses the upper reaches of the Sassafras. The third point is a road between the village

of Sassafras in Kent County and the crossroads of Ginns Corner in Cecil County.

Kent County, the middle county, had a 1970 population of 16,146, of which more than a fourth (4,209) were located in the Chestertown election district, the county seat, and 2,889 in the Edesville district, which includes the town of Rock Hall on the Chesapeake Bay. From the Chesapeake Bay to the Delaware State line, Kent County is separated from Queen Anne's County by the Chester River. There are but four points of contact between the two counties, with the principal point being via the drawbridge at Chestertown. U. S. Route 301 also connects these two counties. There are other river crossings at Crumpton and at Millington.

Queen Anne's County, the southernmost county, had a 1970 population of 18,422, with the heaviest concentration being in the Kent Island and Queenstown election districts with a total of 7,728 people. The Centreville election district, the county seat, had 3,564 people.

The peculiar geography of the Eastern Shore of Maryland, cut as it is by navigable streams, may well be the reason for the insertion into the Governor's Plan of the provision relative to residence, since further examination of relevant maps will reveal that although Talbot and Caroline Counties adjoin and are in the same legislative district, there are but three points of connection, fixed bridges at Hillsboro and New Bridge across the Tuckahoe, and a drawbridge across the Choptank at Dover Bridge; and although Talbot and Dorchester Counties adjoin, their only connection is the mile-long drawbridge across the Choptank at Cambridge opened in the late 1930's. Prior to that there was no connection. Dorchester and Wicomico Counties border each other from the Chesapeake Bay to the Delaware line, being divided by Holland Strait, Tangier Sound, and the Nanticoke River, with the only road connections being drawbridges at Vienna and Sharptown across the Nanticoke.

III.

Validity of the Plan

Calvert contends "that the application of a county residency requirement to the nomination of candidates for election to the House of Delegates from Legislative District 34 would result in a patent violation of the one-man one-vote principle articulated by the Supreme Court in *Reynolds v. Sims* [, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964),] and its progeny, and that this Court's decision in *Secretary of State v. Bryson*, 244 Md. 418 [, 224 A.2d 277] (1966), presenting an indistinguishably similar attempt to compromise the one-man one-vote principle, has not been diluted or abrogated since 1966 and is dispositive of this case." The trial judge concluded that since Cecil County has 61% of the population, Queen Anne's County 21% of the population, and Kent County 18% of the population, permitting "each County [to] elect one delegate . . . does not approximate the concept of one man — one vote" and is an "invidiously wide disparity in population."

In *Bryson*, Maryland Code (1957) Art. 40, § 42E (A-2), as repealed and re-enacted by Chapter 2 of the Acts of the Special Session of 1965, provided that in any senatorial district "comprising more than one county and having two senators, not more than one resident of any one county [might] be nominated by one political party at the primary election, unless the population of that one county exceed[ed] the population of all the remaining counties in the district in the aggregate." It was further provided that any senatorial candidate had to be voted upon at large within the entire district at the primary election and that the provisions of the subsection should not apply to general elections for the office of state senator. Two state senators were to be elected from District 2, composed of Frederick and Carroll Counties. In the Republican primary the two candidates receiving the highest number of votes were both from Carroll County. Since Frederick County by the 1960 census had a population of 71,930 to Carroll County's 52,785, only one Republican candidate resident in

Carroll County could be nominated if the section were valid. Upon the strength of *Davis v. Dusch*, 361 F.2d 495, 497 (4th Cir. 1966), this Court observed that "it is the distribution of representatives rather than the method of distributing them that must satisfy the demands of the Equal Protection Clause." It said *Fortson v. Dorsey*, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401 (1965), and *Reed v. Mann*, 237 F. Supp. 22 (N.D. Ga. 1964), were not apposite since in each case "there was no allegation or evidence that the districts were unequal as to population." Judge Oppenheimer said for the Court:

> "The invalidity of the Section, under the one-man one-vote principle, is clear. Frederick and Carroll Counties have populations in the respective approximate proportions of 7 to 5. Under the operation of the Section, Frederick County could have two nominees in the primary of one party while Carroll County would have none." *Id.* at 428.

Believing, as it was put in *Herring v. Christensen*, 252 Md. 240, 242, 249 A.2d 718 (1969), that "consistency and stability in this Court's rulings . . . are necessary for our citizens to know their respective rights and obligations," that the General Assembly is the branch of government vested with legislative power, and that that body at its periodic meetings by appropriate legislation can take steps to alter a decision of ours with which it may disagree, this Court has consistently adhered to the doctrine of stare decisis. We do not feel bound under that doctrine by the decision in *Bryson*, however, because that case involved a determination based upon the Court's understanding of what the Supreme Court of the United States had held by way of an interpretation of the Constitution of the United States after its revolutionary holdings in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). By the decisions of that court since *Bryson* we have been provided with additional light and, therefore, view the matter somewhat differently.

As has been noted, the decision in *Bryson* relied upon *Davis v. Dusch, supra.* That decision was reversed in *Dusch v. Davis*, 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967), decided after *Bryson. Dusch* involved election of a city council for Virginia Beach. After a United States District Court had held the allocation of members of the city council invalid as denying voter equality, the city charter was amended. The council was composed of 11 members. Four were elected at large without regard to residence. Seven were elected by the voters of the entire city, one being required to reside in each of the seven boroughs. The population of the boroughs ranged from a low of 733 to a high of 29, 048. Mr. Justice Douglas there said for the Court:

> "The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in *Fortson v. Dorsey*, 379 U.S. 433, 438:
>
> > 'It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.'
>
> "By analogy the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is nonetheless the city's, not the borough's, councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs

varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination." *Id.* at 115-16.

* * * * * *

"The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is

Reversed."

Id. at 117.

Although Mr. Justice Douglas in *Davis* said that "there was substantial equality of population in [the] senatorial districts" in *Fortson*, we note that in his dissent in *Fortson* he referred to the three senatorial districts in DeKalb County, stating that "District 41 contain[ed] 75,117 voters," that "District 42 contain[ed] 95,032 voters," and that "District 43 contain[ed] 86,633 voters." The contest in *Fortson* was directed not at population disparity, but at the validity of a plan under which 33 senatorial districts were made up of from one to eight counties with senators elected on a district-wide basis and the remaining 21 senatorial districts were allotted in groups of from two to seven among the seven most populous counties, with senators elected on a county-wide basis rather than on a district-wide basis. A three-judge court had held this to be "a discrimination as between voters in the two classes." The Supreme Court reversed. If one were to think of our Legislative District 34 as being a Georgia county required to elect a representative from each of the subdistricts comprising Cecil, Kent, and Queen Anne's Counties but on a

district-wide basis, one would have an analogous situation to that ruled upon and upheld in *Fortson*.

In *Mahan v. Howell*, 410 U.S. 315, 321, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973), the Court referred to its statement in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964):

> "A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population." 377 U.S. at 580-81.

In *Mahan* a three-judge United States District Court had struck down the apportionment of the Virginia House of Delegates because of a 16.4% variation from the ideal district population, variances which the district court noted were traceable to the desire of the General Assembly to maintain the integrity of traditional county and city boundaries. With one exception, the delegate districts followed political jurisdictional lines of the counties and cities. That exception,

Fairfax County, was allotted 10 delegates, but was divided into two five-member districts. The Court said in *Mahan:*

> "We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational. And if that be so, the decision of the General Assembly to provide representation to subdivisions *qua* subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment. The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergences in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits. For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Id.* at 325-26.

The Court held:

> "The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one. It can reasonably be said, upon examination of the legislative plan, that it does in fact advance that policy. The population disparities that are permitted thereunder result in a maximum percentage deviation that we hold to be within tolerable constitutional limits. We, therefore, hold the General Assembly's plan for the reapportionment of the House of Delegates constitutional and reverse the District Court's conclusion to the contrary." *Id.* at 329-30.

Kent County has adopted the home rule provisions provided by Maryland Constitution Art. XI-F and Code (1957, 1973 Repl. Vol.) Art. 25B. *Maryland Manual 1973-1974,* 465 (1974). Neither Cecil County nor Queen Anne's County has home rule, thus necessitating the enactment of local legislation for those counties by the General Assembly. In fact, the voters of Cecil County rejected home rule at a referendum on the subject. The governmental powers and functions of the counties of Maryland were set forth for this Court by Judge Henderson in *Maryland Committee v. Tawes,* 229 Md. 406, 412, 184 A.2d 715 (1962). Judge Barnes in his dissenting opinion in *Hughes v. Maryland Committee,* 241 Md. 471, 498-503, 217 A.2d 273 (1966), correctly reviewed the functions of counties in greater depth.

To say that a delegate elected by the voters of all three counties but required for election to reside, for instance, in Kent County will be concerned only with the interest of Kent County in the General Assembly is to pay little heed to the realities of political life. Since he is elected by all of the voters in the district, it seems safe to say that one who sees fit to ignore a substantial portion of his constituency undoubtedly will be rebuked when he is next obliged to face the electorate.

Historically, the lower house of legislative bodies has been the one with the largest membership and regarded as closest to the people. Political scientists have taught that it is for precisely that reason that appropriations bills in the Congress of the United States must originate in the House of Representatives.

The General Assembly when it convenes in January, 1975, will not have members elected on a county basis for the first time since the adoption of the Constitution of 1776. *See generally* J. Michener, *The History of Legislative Apportionment in Maryland,* 25 Md. L. Rev. 1 (1965).

As we have previously indicated, the geography of this area is unusual. We believe that there is a legitimate state interest in scattering the delegates

through the legislative district in such manner that no voter will be far removed from a delegate. Without this provision it would be entirely possible for all three delegates to be concentrated in the uppermost regions of Cecil County in an area where the travel time by automobile from, for instance, Stevensville or Queen Anne in Queen Anne's County would be in excess of one hour each way.

With the insight provided by *Dusch* and *Mahan* and relying upon the rational bases set forth by the Supreme Court in *Reynolds* and *Fortson*, we overrule *Bryson* and hold the district validly established.

IV.

Residence Clause of Constitution

Article III, § 9

Calvert suggests that if we see fit to reverse the chancellor on the constitutionality of the legislative districting plan, as we have, that nevertheless the plan is not consistent with the provisions of Constitution art. III, § 9 which provides in pertinent part:

> "No person shall [be] eligible as a Senator or Delegate, who at the time of his election, is not a citizen of the State of Maryland, and who has not resided therein, for at least three years, next preceding the day of his election, and the last year thereof, in the County, or in the Legislative District of Baltimore City, which he may be chosen to represent, if such County, or Legislative District of said City, shall have been so long established; and if not, then in the County, or City, from which, in whole, or in part, the same may have been formed . . ."

Calvert says:

> "The Attorney General has opined that, as applied to a candidate in a legislative district comprised of more than one county, this provision simply means that 'the candidate must have resided in that portion of the county which is a part of

> the . . . district which he aspires to represent.' 51 Op. A.G. 82, 83 (1966), quoted in *Hillyard v. Board of Supervisors of Elections*, 259 Md. 150, 155 (1970). The residency restriction which Appellants seek to enforce requires that a candidate not only reside within a county of the legislative district which he seeks to represent, but also that he receive more votes than any other candidate residing in the same county in order to be nominated or elected in an alleged 'at large' election. This would impose an additional residency restriction on the eligibility of some candidates for election to the General Assembly not authorized by the pertinent constitutional provision."

He further states, correctly:

> "Section 3 of Article III of the Maryland Constitution authorizes the creation of the three types of legislative districts: (1) those in which all candidates are elected at large, (2) those in which each candidate is elected from a single-member subdistrict, and (3) those in which one candidate is elected from a single-member subdistrict while the others are elected from a multi-member subdistrict."

Calvert sees this as at variance with the districting plan. We do not see it that way. In *Hillyard v. Board of Elections*, 259 Md. 150, 269 A.2d 42 (1970), we held, relative to an individual seeking to run for the House of Delegates in Montgomery County who had resided within that county for a year but had not lived in the legislative district for a year, that the constitutional requirement was that he be a resident of the county for the required time, and, thus, he was eligible to run. The requirement here is in accord with that holding.

V.

The Ballot

Since the chancellor ruled that candidates for the House of Delegates should be elected without regard to

residence, it was not necessary for him to consider the issue raised relative to the validity of the ballot as set up pursuant to the instructions of the Attorney General. Since only one resident of Kent County filed for the Democratic nomination to the House of Delegates, the Attorney General said that that candidate's name should not appear on the primary ballot. Special instructions to the voters in the legislative district were suggested, which instructions are reproduced as an appendix to this opinion. Calvert claims this is "incorrect in that it (1) fails to list the candidate from Kent County and (2) instructs the voters that they may vote for only two candidates." We do not see it that way. A primary election is merely an officially supervised party nominating procedure. It appears to have been unknown in Maryland prior to the first decade of this century. *See Hennegan v. Geartner,* 186 Md. 551, 47 A.2d 393 (1946), and *Kenneweg v. Allegany County,* 102 Md. 119, 62 A. 249 (1905). In *Jackson v. Norris,* 173 Md. 579, 195 A. 576 (1937), this Court held that voting machines must be so constructed and arranged as to permit an individual to cast a vote for a candidate whose name did not appear on the official ballot but said "that the right is not applicable to primary elections . . ." In *Supervisors of Elections v. Blunt,* 200 Md. 120, 88 A.2d 474 (1952), the writ of mandamus was sought to compel "the write-in slots on the voting machines of Baltimore City [to be] unlocked for the Primary Election to be held on May 5, 1952 so as to give the voters at said Primary Election an opportunity to write on the ballot and mark in the proper place the name of any person other than those printed on the ballot." In an opinion by Judge Henderson this Court said that "the write-in privilege was never applicable to primary elections, and, indeed, is inconsistent with the whole theory of primary elections." The election laws were extensively revised by Chapter 739 of the Acts of 1957. At that time there was written into the law a provision, now found in Code (1957, 1971 Repl. Vol.) Art. 33, § 5-3 (d), specifically providing that "[t]here shall be no names of candidates written in at primary elections," thus recognizing the decision in *Blunt.*

The fact that primary elections are a party matter for the selection of candidates was set forth for this Court by Chief Judge Marbury in *Hennegan v. Geartner, supra.* In that case Geartner took issue with the provision of law, now embodied in Code (1957, 1971 Repl. Vol., 1973 Cum. Supp.) Art. 33, § 3-8 (b), specifying when one might change his party affiliation. Judge Marbury there said for the Court:

> "Primaries are provided only for majority parties. Those belonging to minor parties must nominate their candidates by convention or petition (Article 33, Sections 32, 33, and 34). No individual may become an independent candidate at the general election who has been a candidate for nomination by a political party in a primary preceding the general election at which he desires to stand for office. Article 33, Section 34. No one can file as a candidate for a party unless he is affiliated with that party. Article 33, Section 49. An exception is made to this last rule for those seeking the office of judge.
>
> "All of the provisions above quoted and referred to indicate the intention of the Legislature to restrict voting at a primary to those who legally and properly belong to the party for which the primary is held. If this can be lawfully done, the permission to a comparatively small number of voters (new and declined) to join a party within six months of the primary, and to participate in the primary, could not invalidate a general provision designed to carry out a lawful intention. The right given them might even be upheld on the doctrine of *de minimis,* but it is not necessary to invoke this. The direct primary is a creature of the Legislature, designed for the purpose of permitting the members of a party to select their candidates under official supervision and control. According to its history and interpretation in this State, it is substituted for conventions or meetings of voters. Such conventions or meetings were always restricted to those belonging to the parties by whom they were held, and so the direct and official primary is so restricted." *Id.* at 558.

Code (1957, 1971 Repl. Vol.) Art. 33, § 5-3 (c) provides:

> "Whenever only one candidate of any such political party for such public office or position has so qualified to have his name so placed upon the official primary election ballot at the expiration of the time allowed, his name and the name of the position for which he is a candidate shall be omitted from the said official ballot, so that the official ballot of such political party shall contain only the names of such candidates for positions, offices, or delegates where there are qualified contestants for such positions."

It is clear to us that the individual seeking the Democratic nomination for the House of Delegates who resided in Kent County comes within the purview of that statute because he was the only resident of Kent County who sought the Democratic nomination. Accordingly, his name should not have been placed on the primary election ballot.[1]

VI.

JURISDICTION

Appellant suggests that the trial court lacked jurisdiction to entertain the constitutional challenge since this Court has exclusive original jurisdiction in such cases. We agree. Constitution art. III, § 5 provides for the manner of establishing plans for the legislative districts of the state. It then provides in pertinent part:

> "Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with re-

[1] We are not obliged for the purposes of this opinion to reach the question that might arise in a legislative district having more than three counties if residents of more than three counties filed for a party nomination. Obviously, if residents of only three counties filed for a party nomination § 5-3 (c) would be applicable.

quirements of either the Constitution of the United States of America, or the Constitution of Maryland."

We have often lamented the absence of legislative history as an aid to the interpretation of Maryland constitutional and statutory provisions. In this instance, however, we have legislative history.

Prior to the constitutional amendment proposed by Chapter 785 of the Acts of 1969 and ratified by the people on November 3, 1970, no reference was made in the Constitution to a redistricting plan to be proposed by the Governor or to the jurisdiction of this Court. It provided simply for a House of Delegates of 123 delegates with allocations to the counties of Maryland and the legislative districts of Baltimore City. The constitutional amendment proposed by Chapter 363 of the Acts of 1972 and ratified by the people at the general election in 1972 had changes in § 5 brought about by its changes to §§ 2, 3, and 4, but it contained no change in the manner of formulating a legislative districting plan or in the matter of our original jurisdiction.

Governor J. Millard Tawes appointed a Constitutional Convention Commission on June 16, 1965, and instructed it "to conduct an inquiry into the necessity for, and extent and nature of any amendment, modification or revision of the Constitution of Maryland, with particular respect to whether a Constitutional Convention should be held, the procedures for calling such a convention, the basis for representation at the Convention and the procedures for the election of the delegates thereto." *Report of the Constitutional Convention Commission* vii (1967). In its report that Commission provided a draft constitution, § 3.03 of which stated:

"Within three months after official publication of the population figures of each decennial census of the United States, the governor shall present to the General Assembly plans of congressional districting and legislative districting and apportionment.

> If the General Assembly is not in session, the governor shall convene a special session. The General Assembly shall by law enact plans of congressional districting and legislative districting and apportionment. If no plan has been enacted for any one or more of these purposes within four months prior to the final date for the filing of candidates for the next general election occurring after publication of such census figures, then the pertinent plan as presented to the General Assembly by the governor shall become law. Upon petition of any qualified voter, the Supreme Court shall have original jurisdiction to review the congressional districting and legislative districting and apportionment of the State and grant appropriate relief, if it finds that any of them does not fulfill constitutional requirements." *Id.* at 128.

In the suggested constitution the highest court of the State was known as the "Supreme Court." The Commission commented in its report upon the above suggestion for review of legislative districting by the State's highest court:

> "The Commission further recommends that the Supreme Court of Maryland have original jurisdiction to review any plan upon the petition of any eligible voter and be empowered to grant appropriate relief. Thus, the Supreme Court could modify any plan of districting and apportionment, or it could develop a completely new plan. In this way there could be Supreme Court review of the constitutionality of any plans that became law by legislative enactment or of the governor's plans which become law by reason of legislative inaction.
>
> "Original jurisdiction, rather than appellate jurisdiction only, is conferred on the state Supreme Court in all districting and apportionment cases so that prompt and final settlement of any constitutional issues involved can be made." *Id.* at 128-29.

The people of Maryland at a special election September 13, 1966, expressed their desire to hold a constitutional convention. The General Assembly enacted Chapter 4 of the Acts of 1967 providing for the holding of a convention, the delegates were elected, the Constitutional Convention convened for organization on July 11, 1967, and then proceeded to formally convene for the conduct of its stated purpose on September 12, 1967.[2] The constitution proposed by the Convention called for a redistricting commission composed of nine people, with the presiding officer and the minority leader of the Senate and the House of Delegates each to appoint two persons and the Governor to appoint one person, who was to serve as chairman. No member of the commission was to be an individual who held "a popularly elected office in the State." It further provided in § 3.06:

> "The commission on legislative redistricting shall submit a plan to the governor, who shall transmit it to the General Assembly by the first day of the regular session in the year in which redistricting is to be effective. If any other plan has not been prescribed by law within seventy days after the transmission of the commission plan to the General Assembly, then the commission plan shall become law. The Court of Appeals shall have original jurisdiction, upon petition of any qualified voter, to review the new redistricting law and the commission plan if it has not become law. If the Court of Appeals finds a redistricting law enacted by the General Assembly invalid, then the commission plan shall become law. If the Court of Appeals finds the commission plan invalid, then the Court of Appeals shall grant appropriate relief for the conduct of the impending election."

That provision reached the convention floor in the form of Committee Recommendation No. LB-2 from the committee on the Legislative Branch. Committee Memoran-

[2] The Honorable J. Millard Tawes, by then a former Governor of Maryland, was a delegate to the Convention from his home county of Somerset and was elected honorary president of the Convention.

dum No. LB-2 commented on its proposals relative to legislative districting. On the subject of the jurisdiction of this Court to review redistricting plans the committee stated:

> "Section 3.03a also provides that the Court of Appeals shall have original jurisdiction to review redistricting plans. The purpose of this provision is to reduce litigation and shorten the time required to dispose of redistricting cases. Since redistricting suits are almost always appealed to the highest state court, it is logical to give the Court of Appeals original jurisdiction and bypass all lower court activity."[3]

The Convention began its consideration of that recommendation on December 1, 1967. A review of the transcript of those proceedings reveals that Delegate Francis X. Gallagher, the Chairman of the Committee on the Legislative Branch, was extensively questioned by various delegates relative to the committee's proposals for legislative redistricting, but not a single question was propounded on the Subject of the review by this Court of legislative districting plans.

The long hours spent in attempting to produce a new constitution for the people of Maryland seemed to come to naught when the electorate rejected that proposed document on May 14, 1968. However, the Legislative Council recognized the need for constitutional revision and appointed a Committee on Constitutional Revision. As a result, many of the proposals of the Constitutional Convention have since found their way into the Maryland Constitution in piecemeal fashion. The proposals relative to the Judicial Disabilities Commission and the District Court of Maryland are two examples. It is obvious that the present constitutional provision relative to redistricting stems from the proposed constitution. The similarity to the provisions relative to jurisdiction of this Court can best be comprehended if the present constitutional provision and

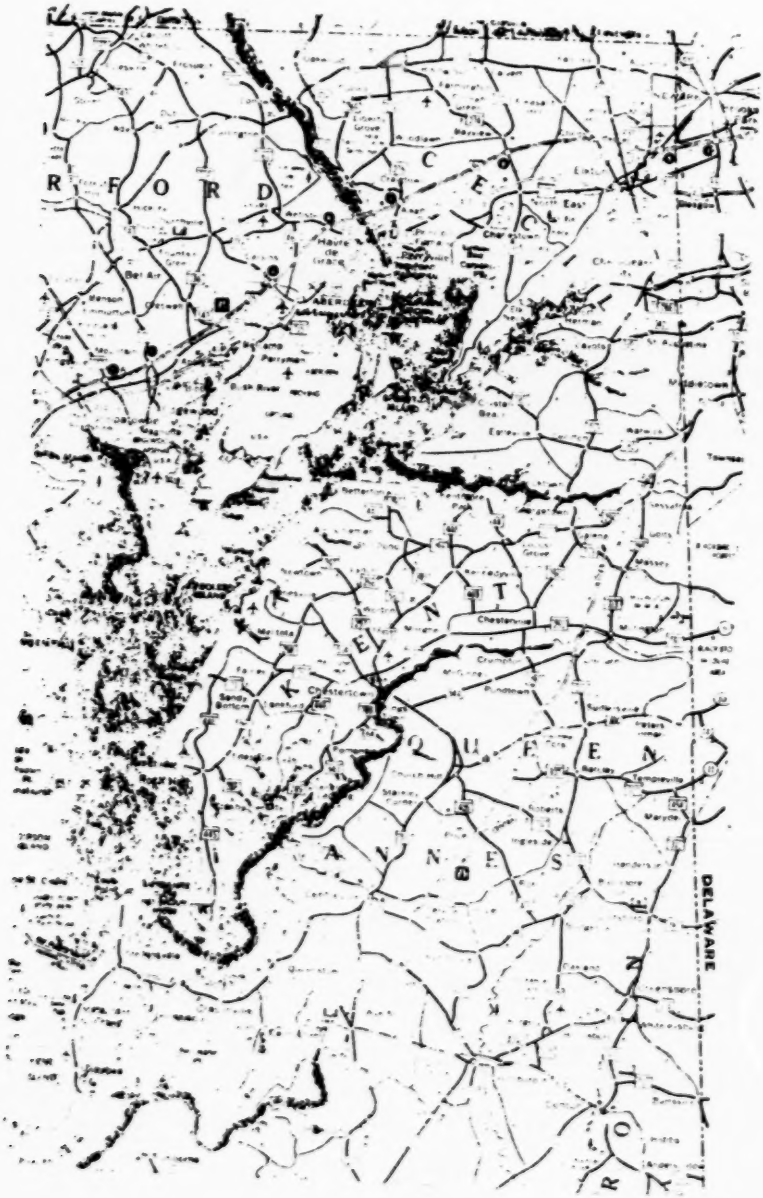
[3] Section 3.03a in the committee proposal became § 3.06 in the proposed constitution.

that proposed by the Constitutional Convention are placed side by side:

Article III, § 5:	§ 3.06 of proposed constitution:
"Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with the requirements of either the Constitution of the United States of America, or the Constitution of Maryland."	"The Court of Appeals shall have original jurisdiction, upon petition of any qualified voter, to review the new redistricting law and the commission plan if it has not become law. If the Court of Appeals finds a redistricting law enacted by the General Assembly invalid, then the commission plan shall become law. If the Court of Appeals finds the commission plan invalid, then the Court of Appeals shall grant appropriate relief for the conduct of the impending election."

The General Assembly which framed the constitutional amendment proposed by Chapter 785 of the Acts of 1969 first giving this Court original jurisdiction in redistricting matters and then framed Chapter 363 of the Acts of 1972 revising the number of seats in the General Assembly, but leaving unchanged the reference to our jurisdiction, is the same General Assembly which enacted Chapter 528 of the Acts of 1970 relative to the jurisdiction of the District Court found in Code (1957, 1973 Repl. Vol.) Art. 26, § 145. Reference to that and to Code (1974) §§ 4-301, 4-302, and 4-401, Courts and Judicial Proceedings Article, a product of the same General Assembly by the enactment of Chapter 2 of the Acts of the first Extraordinary Session of 1973, will reveal that the General Assembly spoke of concurrent

jurisdiction when it meant "concurrent" and spoke of exclusive jurisdiction when it meant "exclusive." Since Art. III, § 5 stemmed from the constitution proposed by the Constitutional Convention Commission and that proposed by the Constitutional Convention, the General Assembly must have been aware of the interpretation placed by each of those groups upon the suggested language relative to jurisdiction of this Court. Accordingly, with this legislative history behind it, we conclude that under this constitutional provision this Court and only this Court may consider a challenge to the constitutionality of a legislative districting plan. Therefore, the trial court in this instance was without jurisdiction to consider that portion of Calvert's complaint which claimed the legislative districting plan to be unconstitutional. The question of whether the name of the sole candidate from one of the three counties of the legislative district for the House of Delegates should appear on the primary election ballot did not involve a challenge to the constitutionality of the legislative districting plan. Thus, that question was within the jurisdiction of the trial court.


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A N N E S
DELAWARE

SPECIAL INSTRUCTIONS TO THE VOTERS IN LEGISLATIVE DISTRICT _____ HOUSE OF DELEGATES ELECTION

Your Legislative District consists of all or part of the following counties:

All of* _____

Part of* _____

The District will be represented by three members of the House of Delegates. In accordance with the Districting Plan adopted by the Court of Appeals, no county or part of a county included in the District may have more than one member of the House of Delegates residing in it. This limitation is applicable to both primary elections and general elections. Notwithstanding this limitation, voting is on an at-large basis and each individual voter may vote for candidates without regard to his residence or the residence of the candidates. Voters may, if they wish, vote for more than one resident of a given county.

The following candidates are unopposed in the primary election, have been declared nominated and their names accordingly do not appear on the primary election ballot but will appear on the general election ballot:

*Democratic Primary**

X, Resident of X County
Y, Resident of Y County

*Republican Primary**

A, Resident of X County
B, Resident of Y County
C, Resident of Z County

* NOTE: Slight variations in this form will be required for each District.

DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-625

WILLIAM B. CALVERT,

Petitioner,

v.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

AND

WILLARD A. MORRIS, STATE ADMINISTRATOR OF ELECTION LAWS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Appeals of Maryland establishing the districting plan here at issue is reported at *In Re Legislative Districting of the State*, 271 Md. 320, 317 A.2d 477 (1974), *cert. denied sub nom. Twilley, et al. v. Governor*

of Maryland, ___ U.S. ___, 95 S. Ct. 70 (October 25, 1974). The unreported opinions rendered by the Court of Appeals of Maryland and by the Circuit Court for Cecil County, Maryland in the proceeding below brought by Petitioner appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether there is any reason why this Court should grant the Petition, having two months ago denied a petition for a writ of certiorari raising the precise issue presented here in the context of the very same redistricting plan provision?

2. Whether this case is now moot?

3. Whether the proviso of the Maryland legislative districting plan that in three multi-county districts no county shall have more than one Delegate residing in it violates the United States Constitution when that proviso constitutes only a basis of residence of Delegates, and each Delegate is elected by the vote of all voters throughout the entire district?

CONSTITUTIONAL PROVISIONS AND JUDICIAL ORDER INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is printed at pp. 2-3 of the Petition. Sections 1 through 5 of Article III of the Maryland Constitution are printed as an Appendix to this Brief in Opposition.

The portions of the judicially ordered districting plan directly at issue here are printed at p. 3 of the Petition.

STATEMENT OF THE CASE

Under the terms of Article III, Section 1 of the Constitution of Maryland, the legislative powers of the State are vested in a bicameral legislature called the General Assembly of Maryland. The upper house, or Senate, has a membership of forty-seven and the lower house, or House of Delegates, has one hundred forty-one members. Md. Const., Art. III, Sec. 2. Section 3 of Article III provides that the State shall be divided into forty-seven legislative districts, with one Senator and three Delegates elected from each district.

The current legislative districting plan traces its origins to the original plan proposed by the Governor of Maryland pursuant to Article III, Section 5 of the Constitution of Maryland, which became law on February 24, 1973 by virtue of the General Assembly's failure to adopt any alternative plan. That plan established forty-seven legislative districts of substantially equal population, three of such districts (34, 35 and 36) consisting of all or part of more than two counties. The Governor's plan, like the plan later adopted by the Court of Appeals and currently in effect, provided that in such districts where members of the House of Delegates were to be elected at large by the voters of the entire district, no more than one delegate could reside in any one county.

Legislative District 34, both as now constituted and as originally established in the Governor's plan, consisted of all of Cecil, Kent and Queen Anne's Counties. The populations (1970 census) of these counties are 53,291, 16,146 and 18,422, respectively.[1] The geography and general characteristics of Legislative District 34 and the three counties which comprise it are described in the opinion of the Court of Appeals below. Appendix to Petition, pp. 19a-20a.

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[1] Legislative District 35 under the Governor's plan consisted of all of Caroline, Talbot and Dorchester Counties and parts of Wicomico and Somerset Counties, and as now constituted includes all of the

As a result of original proceedings instituted by various registered voters, (other than Petitioner) before the Court of Appeals of Maryland pursuant to Section 5 of Article III of the Maryland Constitution, the Court found that constitutionally adequate public hearings had not been held on the Governor's plan and invalidated it by order dated July 31, 1973. The Court then directed that hearings be conducted by its retired Chief Judge, sitting as a special master, and that all registered voters who wished to show cause why the Governor's plan should not be adopted by the Court as the districting plan for the State come forward and either testify at those hearings or formally intervene in the proceedings, or do both. Various registered voters did testify and formally intervene. These proceedings before the Court of Appeals culminated in the order of March 15, 1974, reported at *In Re Legislative Districting*, 271 Md. 320, 317 A.2d 477 (1974), establishing the districting plan which is the object of Petitioner's present attack. The Court's plan varies from the Governor's plan in a number of respects not material here.

Several registered voters of Wicomico County (split between Districts 35 and 36), who had intervened in the Court of Appeals proceedings, filed with this Court a petition for a writ of certiorari. Certiorari was unanimously denied on October 15, 1974 *sub nom. Twilley et al. v. Governor of Maryland.* One of the questions presented there, as set forth at page 2 of the *Twilley* petition, was:

> "Whether Petitioners and all other residents of Wicomico County (population 54,236) have been denied their Constitutional rights under the Federal and Maryland Constitutions by said Order [of the Court of Appeals] . . . providing that no county or part of a

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first three counties and a part of Wicomico County. Legislative District 36 under the Governor's plan consisted of all of Worcester County and parts of Wicomico and Somerset Counties. Now it includes all of Worcester and Somerset Counties and part of Wicomico County. Together, Legislative Districts 34, 35 and 36 comprise what is known as Maryland's Eastern Shore.

county, in a multi-county legislative district, may have more than one resident delegate."[2]

After the completion of these proceedings before the Court of Appeals of Maryland and the filing of the *Twilley* petition for a writ of certiorari, but before its denial, the Petitioner herein, a registered voter of Legislative District 34, a candidate for the Democratic nomination for House of Delegates from District 34, and a resident of Cecil County, instituted a separate suit in the Circuit Court for Cecil County. He had not participated in the earlier proceedings before the Court of Appeals. The suit was filed on August 9, 1974, thirty-two days before the primary election of September 10, 1974 in which Petitioner was a candidate. The principal issue presented was whether the residents of Cecil County, who outnumbered the remaining residents of Legislative District 34, would be deprived of their constitutional rights by a districting plan which only allowed the voters of the District to elect one resident of Cecil County rather than two or three.

Because of the shortness of the time before the primary election, the case was presented to and decided by both the trial court and the Court of Appeals of Maryland on an expedited basis. On August 16, 1974, the Circuit Court for Cecil County granted the relief prayed and ordered that the primary election in Legislative District 34 be conducted without regard to the residence limitation embodied in the earlier order of the Court of Appeals of Maryland. It did so primarily on the basis of its conclusion that the residence limitation violated the rights of the voters of Cecil County

[2] The question was phrased in the State's brief in opposition (p. 2) as follows: "Whether the proviso of the Maryland legislative districting plan that in districts such as District 36 no county shall have more than one delegate residing in it affects equality of representation where that proviso constitutes only a basis of residence of delegates, and is not a basis for voting or representation."

under the Fourteenth Amendment to the United States Constitution.

An immediate appeal was taken and the Court of Appeals of Maryland, after granting a joint petition for a writ of certiorari, receiving briefs and hearing argument, entered a per curiam order on August 23, 1974, reversing the judgment below and stating that the applicable portion of its earlier order of March 15, 1974 "is hereby reaffirmed as being constitutional and valid. . . ." Appendix to Petition, p. 13a. On October 10, 1974, the Court of Appeals issued an opinion setting forth the grounds for its decision. In upholding the districting plan and residence limitation on federal constitutional grounds, the Court noted that each Delegate is elected by, and must be responsive to, all of the residents of the district without regard to his or their residence, and relied on four decisions of this Court, principally, *Dusch v. Davis*, 387 U.S. 112 (1967). Appendix to Petition, pp. 21a-28a. The Court also ruled that it had exclusive original jurisdiction under the Maryland Constitution to pass on the constitutional claims and rejected the claims that the residence limitations violated the Maryland Constitution and that the primary election ballot did not conform with the requirements of Maryland statutory law. Appendix to Petition, pp. 28a-38a.

The September primary election was conducted in accordance with the per curiam order of August 23rd. In Legislative District 34, the resident of Kent County who had filed for the Democratic nomination for the House of Delegates was declared nominated and his name was omitted from the ballot in accordance with State law and the order of the Court of Appeals. In the contest for the remaining two nominations, the Petitioner received the third highest total of votes and thus failed to secure his party's nomination. The two successful nominees, one a resident of Cecil County

and the other of Queen Anne's County, were separated by only 310 votes.

The general election was conducted on November 5, 1974, and, in District 34, three candidates residing in the three different counties received the greatest number of votes and the fourth candidate, a resident of Cecil County, was defeated by a substantial margin. The successful candidates will serve a term of four years as members of the House of Delegates.

ARGUMENT

I.

THE PETITION PRESENTS EXACTLY THE SAME ISSUE WHICH THIS COURT DECLINED TO REVIEW TWO MONTHS AGO.

The precise legal issue presented here by Petitioner was also squarely presented for review only months ago, when certain registered voters of Wicomico County filed their petition for a writ of certiorari seeking a review of Maryland's court ordered districting plan as applicable to at large voting in multi-county districts. *In Re Legislative Districting*, 271 Md. 320, 317 A.2d 477, *cert. denied sub nom. Twilley, et al. v. Governor of Maryland*, ... U.S. ..... , 95 S. Ct. 70 (October 15, 1974). One of the questions presented to this Court for review in those proceedings was whether the 44,568 residents of Wicomico County included in Legislative District 36 had been denied their federal constitutional rights by virtue of the fact that two of the three Delegates to be elected from their District must be residents of the other two counties included in the District. Like the residents of Cecil County here, the 44,568 residents of Wicomico County in *Twilley* outnumbered the remaining residents of the District. The denial of certiorari in *Twilley* was clearly correct and appropriate, and the difference in the particular numbers of residents involved in Legislative District 34 and Cecil County does not justify review of the same issue presented in *Twilley*. Indeed, the

fact that the Petitioner's candidacy for the House of Delegates has now proven unsuccessful and the 1974 elections are now history suggests that if the case is not moot, there is even less reason for granting review.

II.

THIS CASE IS NOW MOOT.

Even if Petitioner could prevail on the merits, no relief could be afforded Petitioner in connection with his candidacy in the 1974 elections. Indeed, the applicable decisions of this Court indicate that even if the question had been presented here during the month prior to the September primary election, relief would not have been available. See, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), *Roman v. Sincock*, 377 U.S. 695 (1964), and *Williams v. Rhodes*, 393 U.S. 23 (1968). Petitioner has sought relief below essentially as a candidate and the only relief sought was the issuance of an injunction with respect to the 1974 elections. No declaratory relief was sought. Appendix to Petition, pp. 16a-17a. Accordingly, since the relief prayed is no longer available and the Petitioner's status as a candidate has been terminated by his defeat, the case is now moot and the petition should be dismissed for that reason. *Richardson v. McChesney*, 218 U.S. 487 (1910). The limited nature of the relief requested is significant. In *DeFunis v. Odegaard*, ... U.S. ..... , 94 S. Ct. 1704 (1974), this Court, in vacating the judgment of the lower court on grounds of mootness, pointedly noted that "DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School." 94 S. Ct. at 1706.

III.

THE LOWER COURT CORRECTLY APPLIED THE CONTROLLING DECISIONS OF THIS COURT IN UPHOLDING THE RESIDENCE LIMITATION.

It should be stated at the outset that this case does not involve a situation where there is any noticeable disparity between the relative populations of representational units and the numbers of legislators representing those units. Legislative District 34 is one of three multi-county legislative districts electing three members of the House of Delegates on an at large basis. There is no suggestion or argument made here that the residents of District 34 as a whole are not accorded full representation in Maryland's General Assembly relative to the other forty-six legislative districts.

Petitioner urges that while the District as a whole is fully represented, the residents of Cecil County, who comprise a majority of the residents of the District, are invidiously discriminated against because they must be represented by one of their own residents and by two other Delegates who will necessarily reside in the other two counties included in the District. It is clear that the long line of cases in which this Court has attempted to delineate the limits of constitutionally permissible population variance among different representational units is not directly applicable. The three counties comprising Legislative District 34 do not constitute separate representational units. To view these three counties as constituting sub-districts for representational purposes simply by virtue of the fact that each county is assured that one of its residents will be elected to the House of Delegates by the voters of the entire District would require an extraordinarily parochial view of the democratic process.

As the Court of Appeals of Maryland correctly concluded, the case is essentially controlled by the decision of this Court

in *Dusch v. Davis*, 387 U.S. 112 (1967). Indeed, the Court of Appeals was so convinced of this that it overruled its earlier decision in *Secretary of State v. Bryson*, 244 Md. 418, 224 A.2d 277 (1966), which had relied upon the lower federal court decision reversed in *Dusch v. Davis*.

Dusch v. Davis involved the districting plan applicable to the election of a city council for Virginia Beach, Virginia. The council was composed of eleven members and the districting plan provided that four members were to be elected at large without regard to residence[3] and that seven members were to be elected at large, with one of these being required to reside in each of the seven boroughs. The population of the boroughs ranged from a low of 733 to a high of 29,048. Mr. Justice Douglas there said for the Court:

> "... The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in Fortson v. Dorsey, 379 U.S. 433, 438, 85 S. Ct. 498, 501, 13 L. Ed. 2d 401:
>
> > "'It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.'
>
> "By analogy the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is

[3] Here, the Senator for Legislative District 34 is elected at large without regard to residence.

nonetheless the city's, not the borough's, councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow." 387 U.S. at 115-16.

The Court then went on to note that under *Reynolds v. Sims*, 377 U.S. 533 (1964), and succeeding cases, the Equal Protection Clause of the Fourteenth Amendment is violated in apportionment cases only when there is an *invidious* discrimination. The Court found that the population disparity among the seven boroughs of Virginia Beach did not support a finding of invidious discrimination and that there was sufficient justification for the residency provisions in the desire to assure that there would be members of the City Council with some general knowledge of the distinct problems of each of the disparate boroughs.

The decision of the Supreme Court in *Dusch* is, we submit, a compelling if not controlling precedent for upholding the constitutionality of the residence limitation applicable in Legislative District 34. Despite the residence limitation and notwithstanding that a candidate or Delegate may reside in a particular county, the fact of the matter is that all of the Delegates in the District are elected at large and represent the *entire* District and *all* of its residents. While it may be assumed that the elected Delegates will feel a greater affinity towards the needs and requirements of those residents of the county in which they reside, they are ultimately responsible to the voters of the entire District. As the Court of Appeals said below:

"To say that a delegate elected by the voters of all three counties but required for election to reside, for instance, in Kent County will be concerned only with the interest of Kent County in the General Assembly

> is to pay little heed to the realities of political life. Since he is elected by all of the voters in the district, it seems safe to say that one who sees fit to ignore a substantial portion of his constituency undoubtedly will be rebuked when he is next obliged to face the electorate." Appendix to Petition, p. 27a.

Indeed, the voters of Cecil County are assured by their very numbers that their Delegates who reside in the two smaller counties will be responsive to their needs. The composition of the District's electorate essentially forces these Delegates to secure significant support from the more numerous voters of Cecil County in order to survive politically.

The population disparities involved among the residence areas are not nearly as dramatic here as they were in *Dusch v. Davis*. The total population of Virginia Beach was 85,218 (versus 87,859 for Legislative District 34). In *Dusch* the smallest borough (Blackwater) was assured a 9% representation (one of eleven councilmen) despite the fact that it contained less than 1% of the population (744). Under Petitioner's view of the "realities" of at large voting with residence limitations, that borough received a representation nine times greater than its population justified. Yet here, the smallest county in District 34 includes 18% of the District's population and is assured of having 33⅓% of the District's Delegates residing within its borders.[4]

Just as this Court found ample justification for the at large voting residence limitation plans in *Fortson v. Dorsey*, 379 U.S. 433 (1965) and *Dusch*, the Court of Appeals of Maryland correctly found substantial legitimate justifications for the similar plan involved here. In fact, the justifica-

[4] We do not, of course, have any threat here of a substantial minority of the population being able to control a majority of a legislative body. Such a danger was present in *Dusch*, but the Court apparently felt that the four totally at large seats offered adequate protection against that.

tion for assuring that each of the three counties in District 34 has a resident member of the General Assembly of Maryland is stronger than the factors cited in *Dusch v. Davis*. Here, the residence sub-areas are counties, which in Maryland have consistently constituted the controlling building blocks for representation in the General Assembly up until the current districting plan. While Kent County possesses limited home rule powers, neither Cecil County nor Queen Anne's County has home rule. Both of these counties must therefore rely upon the enactment by the General Assembly of local legislation. See discussion in the Court of Appeals opinion below, Appendix to Petition at p. 27a. Primarily for these reasons, Article III, Section 4 of the Constitution of Maryland requires that due regard be given to the boundaries of political subdivisions in the creation of legislative districting plans.

Beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), and as recently as *Mahan v. Howell*, 410 U.S. 315 (1973), this Court has consistently recognized the legitimacy of relying upon the special needs and configurations of local political subdivisions in justifying reasonable deviations from strict population-based representation in State legislatures. As this Court said in *Mahan*:

> "We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational. And if that be so, the decision of the General Assembly to provide representation to subdivisions *qua* subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment. The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergencies in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature, and whether, if

so justified, the divergencies are also within tolerable limits." 410 U.S. at 325-326.

Here, in recognition of the special needs of the counties which must rely upon the General Assembly for local legislation, the districting plan does not attempt to go so far as to provide representation to the counties in District 34 *qua* counties. Rather, the plan represents a legitimate and sensible effort to both avoid representational disparity and to insure that each county will have some voice in the lower house of the General Assembly. If there were no residence limitations, Cecil County could control the three Delegates,[5] all of whom could ignore the needs of the two smaller counties and rely solely on the larger Cecil County electorate to return them to office. The residence limitation avoids this danger, assures each county that it will have a resident in the House of Delegates, and at the same time insures that all of the Delegates will be responsive to the residents of the entire District.

These special needs of the Maryland counties included in District 34 for local legislative action by the General Assembly, when taken together with the geographical considerations discussed by the Court of Appeals in its opinion, more than justify the districting plan here in question. No scheme to avoid the consequences of reapportionment or to perpetuate incumbents in office is presented here. No racial, economic, political or other discrimination is present. There can be no invidious discrimination in a plan which reflects such careful and proper consideration of the competing

[5] This identical problem was presented and commented upon in *Dusch v. Davis*. There Mr. Justice Douglas noted that the two most populous boroughs could, if they acted in concert, elect all eleven councilmen if voting were at large but there were no residence limits. 387 U.S. at 117, n. 5. Precisely the same thing can be said with respect to Legislative District 34 and the potential total control thereof by the residents of Cecil County. The present plan avoids this.

interests involved. The Court of Appeals correctly decided the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF MARYLAND, ARTICLE III

Section 1. Legislature to consist of two branches; to be styled General Assembly.

The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2. Membership of Senate and House of Delegates.

The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.

Section 3. Division of State into Legislative districts; number of Senators and Delegates from each district; subdivision of districts.

The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.

Section 4. Requirements for districts.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the president of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the third year following the 1970 census, and in the second year following every census thereafter, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after the opening of the regular session of the General Assembly in the third year following the 1970 census and in the second year following every census thereafter, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the third year following the 1970 census and in the second year following every census thereafter, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

Upon the adoption by the qualified voters of the State in 1972 of the above amendments to Sections 2, 3, 4 and 5 of this Article, any legislative districting and apportionment plan submitted by the Governor or adopted by the General Assembly pursuant to the provisions of this section as they existed immediately prior to the adoption in 1972 of the said amendments, shall be void and of no effect provided that any plan adopted by the General Assembly prior to the first day of the regular session of 1973 in conformity with Sections

2, 3, 4 and 5 of this Article, as amended in 1972, shall not be void, but shall become law immediately upon the adoption of the amendment. The adoption of these amendments in 1972 does not affect the election, tenure, powers, privileges, and duties of any member of the General Assembly in office when these amendments become effective, for the remainder of the term for which he was elected.